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IN THE

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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The American Farm Bureau Federation respectfully submits this brief as *amicus curiae* with the written consent of the parties given and filed with the Clerk.[1]

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of

[1] Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all fifty states and Puerto Rico representing more than 5 million member families. Farm Bureau has participated as an amicus curiae in many cases in this Court and the courts of appeals involving issues of paramount concern for its farmer and rancher members, particularly cases such as this one that involve issues arising under Section 404 of the Clean Water Act ("CWA").

Farm Bureau farmer and rancher members produce virtually every kind of agricultural commodity produced commercially in the United States. They own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fiber and other basic necessities. Like all farmers and ranchers in the United States, they are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm productively and profitably. Indeed, in some instances that ability is being eliminated altogether.

The protection of wetlands under Section 404 of the CWA is one of the more serious and contentious problems that production agriculture faces today. From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a controversial, complex and contentious program.

Farm Bureau has followed the wetlands protection evolution for nearly three decades and watched it take on a life of its own as it marched relentlessly up the hill consuming ever dryer lands. What was conceived as a statute to control the pollution of water has been stretched and turned into a national land use zoning act. Those forces which did not succeed in getting federal land use control legislation enacted

in the 1960s and early 1970s have seized upon the Section 404 program as one of the more effective mechanisms to impose federal regulatory measures on as much of the American landscape as possible.

Farm Bureau and its farmer and rancher members have a direct interest in the outcome of this case. One of the more problematic aspects of the Section 404 regulatory program is the uncertainty as to what are jurisdictional wetlands. Private property owners, especially farmers and ranchers who own the bulk of the lands upon which potential jurisdictional wetlands are to be found, are in desperate need of this Court's clarification of what are jurisdictional "non-adjacent wetlands" under Section 404 of the CWA and resolution of the split amongst the circuits on the jurisdictional reach of the Section 404 regulatory program.

ARGUMENT

Thus far this Court, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has determined only "navigable" and "adjacent wetlands" to be jurisdictional wetlands under the CWA. By way of a footnote, this Court left open the question of jurisdiction over wetlands that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8.

The U.S. Army Corps of Engineers ("Corps") has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands no matter how isolated or remote. In overturning the Corps' "migratory bird rule", this Court recently offered further guidance on the extent of the Corps' jurisdiction under Section 404 in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). In *SWANCC*, this Court found that the plain text and import of Section 404 is that it reaches only waters and wetlands that have a "sufficient nexus" and are "inseparably bound up with" waters of the United States, and

applying that standard, does not reach "nonnavigable, isolated, intrastate waters." *Id.* at 169-170.

In response to *SWANCC*, the Corps effectively substituted the "migratory bird rule" with a "migratory raindrop rule" in its Section 404 regulatory posture. The Corps has asserted, in this and other cases, federal regulatory authority over wetlands that have only an ephemeral, intermittent, occasional and indirect man-made hydrological connection to navigable waters located miles distant.

The Fourth Circuit in this case has upheld the Corps' broad assertion of Section 404 jurisdiction. The Fourth Circuit's decision allows the Corps to impose its Section 404 regulatory burdens on any land use activity in any wetland from which a drop of water may ultimately find its way to navigable waters. The Fourth Circuit even found that man-made ditches and culverts were waters of the United States.

The Fourth Circuit's decision in this case is not only at odds with this Court's decision in *SWANCC*, but also in direct conflict with the decisions of the Fifth Circuit interpreting and applying the guidance set forth in *SWANCC*. The Fifth Circuit, first in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and most recently in its December 16, 2003 decision in *United States v. Needham*, _____ F.3d _____ (5th Cir. 2003), reads *SWANCC* to authorize Section 404 jurisdiction over waters that are actually navigable or adjacent to an open body of navigable water. The Fifth Circuit determined small seasonal creeks and intermittent streams which only infrequently contain running water not to be sufficiently linked to navigable waters to qualify themselves as navigable waters.

Thus, there is a need for this Court to grant certiorari to resolve the conflict amongst the circuits over the authority of the Corps to regulate discharges of dredged or fill material into wetlands that are not adjacent to bodies of open waters

and to further clarify its guidance in *SWANCC* to the effect that wetlands that are not adjacent to actually navigable waters do not have a "sufficient nexus" to be jurisdictional wetlands under Section 404 of the CWA.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONGST THE CIRCUITS OVER THE REACH OF SECTION 404 REGULATORY JURISDICTION

This case originated as a CWA Section 404 enforcement action by the Corps for unauthorized activities in a wetland. Section 404 regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The CWA does not define "waters of the United States." Corps regulations define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (33 C.F.R. § 328.3(a)(1)), tributaries of such waters (33 C.F.R. § 328(a)(5)), and wetlands adjacent to such waters or their tributaries. 33 C.F.R. § 328.3(a)(7). Corps regulations do not define "tributaries" and do not define manmade ditches for drainage or irrigation as navigable waters of the United States.

The trial court ruled that the Corps did not have jurisdiction over the wetlands in question. *United States v. Newdunn Associates, LLP, et al.*, 195 F. Supp. 2d 751 (E.D. Va., 2002). The Corps had claimed jurisdiction upon the basis of a hydrological connection between the wetlands and the navigable portion of a stream some miles distant. The trial court carefully traced the tenuous hydrological connection involved through a spur ditch, a man made drainage ditch and

through a culvert under an interstate highway. The trial court, applying this Court's guidance in *SWANCC*, concluded that the Corps had not established a sufficient connection between the wetlands in question and navigable waters or waters of the United States. The trial court rejected the Corps' assertion that a culvert or storm drain pipe is a "tributary." The trial court opined that the Corps' assertion of jurisdiction over the wetlands in question far exceeded the grant of authority by Congress in the CWA.

On appeal, the Fourth Circuit reversed. *United States v. Newdunn Associates, LLP, et al.*, 344 F.3d 407 (4th Cir. 2003). The Fourth Circuit held that there was a "sufficient nexus" in the attenuated connections between the wetlands and the navigable portion of a stream. The Fourth Circuit's decision allows the Corps to assert Section 404 jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and to consider intermittent and ephemeral waters in man made ditches, culverts and drains located miles distant from navigable waters as "tributary."

The Fourth Circuit's decision in this case is in direct conflict with decisions of the Fifth Circuit. The Fifth Circuit was the first court of appeals to consider the jurisdictional scope of the term "navigable waters" after *SWANCC*. In *Rice v. Harken Exploration Co.*, *supra*, the Fifth Circuit retreated from its previous broad interpretation and ruled that federal regulatory authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

The Fifth Circuit has most recently reconsidered and reaffirmed its position on navigable waters taken in *Rice*. On December 16, 2003, the Fifth Circuit issued its decision in *United States v. Needham*, *supra*, and stated therein:

> The OPA imposes strict liability upon parties that discharge oil into "navigable waters," a term defined in the statute to mean "the waters of the United States,

including the territorial sea." 33 U.S.C. § 2701(21) (2000)). [Footnote omitted.] This is co-extensive with the definition found in the Clean Water Act ("CWA"). *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001) (citing 33 U.S.C. § 1362(7) (2000)). [Footnote omitted.] *Rice* establishes that the OPA, like the CWA, does not extend federal regulation to the outermost limits of the Commerce Clause. *Id.* at 269-70.

Although under both the OPA and the CWA "waters and wetlands need not always be navigable-in-fact to be protected," *id.* at 268, the Supreme Court recently found the inclusion within "waters of the United States" of certain isolated, non-navigable waters exceeded the Army Corps of Engineers' regulatory power under the CWA. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), 531 U.S. 159, 172-74, 121 S.Ct. 675, 682-84 (2001). The Court emphasized that these isolated bodies of water were neither navigable-in-fact nor adjacent to open water. *Id.* at 168.

* * *

Nevertheless, the United States urges this court to approve its regulatory definition of "navigable waters." *See* 40 C.F.R. § 300.5 (2003). This definition includes as "navigable waters" all "tributaries" of navigable-in-fact waters. *See id.* at § 300.5(d). According to the government, the definition covers all waters, excluding groundwaters, that have any hydrological connection with "navigable water." At least two courts appear to have agreed with this expansive interpretation. *See United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (asserting authority, under the CWA, over wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into navigable Wicomico River and Chesapeake Bay"); *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (asserting

> authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river).
>
> In our view, this definition is unsustainable under *SWANCC*. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269.

Slip Opinion, pp. 7-8.

As a result, there currently exists disparate wetland regulation for property owners in the Fourth and Sixth Circuits versus the owners of property in the Fifth Circuit. Such disparate regulation of wetlands is untenable. Property owners are entitled to consistent regulatory treatment under Section 404 of the CWA throughout the United States. This Court should, therefore, grant certiorari to resolve the conflict, and to more clearly define jurisdictional "non-adjacent wetlands."

II. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN RESOLVE THE UNCERTAINTY AS TO WHAT ARE JURISDICTIONAL NON-ADJACENT WETLANDS

As the split amongst the circuits obviates, there is a great need for this Court to decide the important issue which it specifically reserved in *United States v. Riverside Bayview Homes, Inc.*, *supra*, as to what are jurisdictional non-adjacent wetlands. This Court narrowed the issue in *SWANCC* by holding that the Corps' Section 404 jurisdiction does not reach ponds not adjacent to navigable waters that are used by

migratory birds. This Court found that the plain text and import of Section 404 is that it reaches only waters and wetlands that have a "sufficient nexus" and are "inseparably bound up with" navigable waters, and that applying that standard Section 404 does not reach "nonnavigable, isolated, intrastate waters." 531 U.S. 167, 169-170.

Since *SWANCC*, the Corps has been successful in the Fourth and Sixth Circuits in advancing a regulatory posture of asserting Section 404 jurisdiction over all water with any hydrological connection to navigable waters, no matter how remote and attenuated. In so doing, the Corps has effectively replaced the "migratory bird rule" with a more potent "migratory raindrop rule" that leaves virtually no water anywhere in the nation beyond the Corps' regulatory reach.

In the wake of *SWANCC*, the Corps had sought public comment to determine if further regulatory clarification was needed. However, on December 16, 2003, the Environmental Protection Agency ("EPA") and the Corps issued a joint press release announcing that they would not be issuing a new rule on federal regulatory jurisdiction over isolated wetlands. *EPA and Army Corps Issue Wetlands Decision*, Headquarters Press Release, U. S. Environmental Protection Agency, December 16, 2003. In so doing, the EPA and the Corps reportedly jettisoned an internal draft of revised rules in response to *SWANCC* that proposed withdrawing federal protection from many isolated wetlands and intermittent streams. See *U.S. Won't Narrow Wetlands Protection*, New York Times, December 17, 2003. In dropping plans for rulemaking, the agencies indicated that, with the degree of success they have realized in the Fourth and Sixth Circuits, they were content to allow the courts to clarify the bounds of Corps' Section 404 jurisdiction. See *EPA, Appellate Decisions May Return Water Act Battle To High Court*, Inside EPA, December 19, 2003 ("[EPA Administrator] Leavitt said the agency believes it should continue reviewing data on the

issue while allowing the 'courts to go forward and address the jurisdiction issue' on a case-by-case basis.").

Thus, without this Court's review in this case, the regulatory reach of the Section 404 wetlands program will exceed that which this Court fended off in *SWANCC*. Further, the regulatory reach of Section 404 will continue to be determined on an *ad hoc* basis with inconsistent results from different Corps divisions and courts. Whether the Corps asserts Section 404 jurisdiction over a particular wetland will depend upon where in the country the wetland is located. Such expansive and disparate regulation of wetlands is untenable.

Private property owners, especially America's farmers and ranchers upon whose lands the bulk of the non-adjacent wetlands are to be found, are entitled to consistent treatment under the CWA and its Section 404 program throughout the country. It is critical, therefore, that this Court grant certiorari to resolve the conflict amongst the circuits, to resolve the uncertainty as to what are jurisdictional non-adjacent wetlands, and to once again rein in regulatory overreaching by overzealous federal agencies.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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